

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

RingCentral, Inc. Petition for Expedited
Declaratory Ruling

CG Docket No. 02-278

Comments of Robert Biggerstaff

Robert Biggerstaff submits these comments on the Petition for Expedited Declaratory Ruling filed by RingCentral, Inc.,¹ dated July 6, 2016. The Petition should be denied.

A Fax Broadcaster is the Sender in This Case.

There are significant unstated—and possibly unintended—consequences of RingCentral’s quest to have a fax broadcaster deemed not to be the “sender” of a fax. While in some scenarios, that may be appropriate, it is not appropriate to establish a rule declaring that to be true in all instances . . . particularly when the fax broadcaster is the author of advertising content that the fax broadcaster provided to its customer for inclusion in the customer’s fax transmission.

If this were the rule, a fax broadcaster could freely add advertising to its clients’ outgoing faxes. We already have e-mail providers that add advertising to their users’ outgoing e-mails. This is obviously a well established business model based on the proliferation of such systems. YouTube now adds advertising to user-submitted videos. Fax service bureaus (a/k/a fax broadcasters) like RingCentral will be perfectly insulated

¹ *RingCentral, Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, (filed July 6, 2016) (“Petition”).

from TCPA liability if the Petition were granted.

The Commission's existing rules and guidance regarding the "sender" of a fax are adequate. It is a fact-based inquiry that should be left to the specifics of each case. The existing guidance about when a fax broadcaster is liable for its customer's faxes (such as a high degree of involvement, providing lists of fax numbers to the customer, providing legal guidance, etc.) is also the appropriate way to address this question, which again is on a case-by-case basis.

In the example provided in the Petition, RingCentral authored fax cover pages with advertising for RingCentral's services, and provided those cover pages for its customers to use. Under existing rules and guidance, RingCentral is the "sender" of that portion of the cover page authored by RingCentral—which is the portion that advertises RingCentral's services.

Some other examples are instructive. Had RingCentral decided to sell advertising space on its cover pages, and placed text on a cover page advertising Acme Widgets in accordance with a request from Acme, then Acme would properly be the "sender" of that portion of the fax under existing rules.² If a customer of RingCentral designed its own cover page that included advertising, that customer—not RingCentral—would be the "sender."

I also note that the Petition itself has limiting language related to this question, limiting it to where "a third party content generator" uses the fax broadcaster. But in this case, there are two content generators; one is the customer of RingCentral and the other is RingCentral itself. Each is responsible for the content it authored.

A Quantitative *De Minimis* Test Is Unwise.

RingCentral also asks for a quantitative test for what qualifies as *de minimis*

² In this example, a *de minimis* analysis is not reached since the context makes clear the "primary purpose" was to deliver advertising for Acme.

advertising under the TCPA. A quantitative test for whether advertising meets a *de minimis* threshold is similarly imbued with moral hazard. If some quantitative measurement of *de minimis* was adopted, it would launch a new fax advertising business model where the size of the ads was limited to the *de minimis* threshold thus escaping the TCPA and the Commission's rules. It would also inculcate some faxes that, while larger than the *de minimis* threshold, nonetheless do not have a primary purpose of advertising. This militates in favor of a case-by-case holistic determination, consistent with existing Commission guidance.

The Text Is an Advertisement.

The text "Send and receive faxes with RingCentral" is an advertisement of the services of RingCentral. It is not merely a statement identifying the platform that transmitted the fax.³ Had the text stated "Sent using RingCentral" or "© RingCentral" that would be a statement arguably intended as its "primary purpose" for identification, which is appropriate for consideration of *de minimis* treatment.⁴ A statement where the "primary purpose" is advertising is not appropriate for *de minimis* consideration under the Commissions 2006 TCPA Order. What is important, however, is first determining the "primary purpose" and then considering whether *de minimis* treatment is to be applied pursuant to the 2006 TCPA Order. These questions do not depend solely on the text, but also the font, the size, the placement on the page, the intent of the author, and other elements. This is best left to an individual determination on a case-by-case basis.

Reliance on Third-party Consent for Fax Advertisements Is Improper.

Unlike calls to cell phones, an advertiser cannot rely on third-party consent to send

³ For example, someone could use a cover page with the text in the footer "Send and receive faxes with RingCentral" but send that fax using another service provider such as j2 Global.

⁴ 2006 TCPA Order, ¶51.

fax advertisements because the affirmative defense of “prior express invitation or permission” has additional elements that must be met for a fax to be compliant, while the “express consent” defense for robocalls only has one.

Importantly, the TCPA requires prior express invitation or permission, not simple consent. In order for consent to be “express” is must be:

Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. *Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C.A.Minn.*, 34 F.2d 270, 274. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with “implied.”⁵

Even if I expressly consent to receive an advertising fax on behalf of ABC company at a particular fax number, that in no way constitutes express consent for an advertising fax authored by and advertising XYZ company, even if it was sent by ABC company.

If an advertiser relies on third-party consent, it does so at its own peril as to whether the elements of that consent are valid under the TCPA and were validly conferred. But such consent categorically does not extend to the other prongs of an advertising fax, such as a proper opt-out notice.

Conclusion

In essence, RingCentral wants to be permitted to include an advertisement for RingCentral on the cover pages it provides to its customers, so RingCentral can “piggyback” its own advertising on its customer’s faxes. While RingCentral may not state its Petition in such direct terms and continuing that conduct may not be the ultimate goal of RingCentral as it appears to be merely seeking to shed liability for past conduct. But rest assured, the relief sought by RingCentral will result in the precise “piggyback” scenario described

⁵ Black’s Law Dictionary (Revised 6th ed.). Webster’s dictionary provides a similar definition.

above. It might not be implemented by RingCentral, but there are certainly less scrupulous faxers out there who will eagerly employ it.

Thank you very much for your time considering my comments. I remain,

Sincerely

/s/ Robert Biggerstaff

Robert Biggerstaff
August 28, 2016